PRIVY COUNCIL REPORTS

SYARIKAT BUNGA RAYA TIMOR JAUH SDN. BHD. & ANOR. v. TRACTORS MALAYSIA BHD.

[P.C. (Lord Fraser of Tullybelton, Lord Bridge of Harwich, Lord Brandon of Oakbrook, Lord Brightman and Sir John Megaw), November 24, 1982, and January 27, 1983]

[Privy Council Appeal No. 11 of 1981]

Practice and Procedure – Summary judgment, application for – Leases of tractors – Whether leases in fact hire-purchase agreements – Triable issue – R.S.C. 1957, O. 14.

Commercial Transactions – Leases of tractors – Whether leases in fact hire purchase agreements – Option to purchase given by letter – Residual value of tractors stated in agreement – Hire Purchase Act, 1967, s. 6.

In this case the respondents by nine agreements in writing let to the first appellant nine tractors. The agreements were called Equipment Lease Agreements but the appendix to the agreements stated the residual value as being $1/–. The appellants fell into arrears of the rent and the respondents sued by a specially indorsed writ for payment of arrears of rental with interest and certain other charges. They then applied for summary judgment under Order 14 of the Rules of the Supreme Court, 1957. The application for summary judgment was resisted on the ground *inter alia* that the agreements were in reality hire agreements. In support of their contention the appellants relied on a letter dated March 21, 1975, that is, before the agreements were executed. The relevant portions of the letter were as follows –

"LEASE AGREEMENTS FOR CATERPILLAR EQUIPMENT

Further to your discussion with the writer and our General Manager Sales, we wish to confirm the following arrangements:–

1. We attach herewith our equipment lease agreements for two (2) units Cat D6C DD and one (1) unit Cat D7F DD all complete with Carco winches. The details and terms of the lease are as per the agreements attached. We will deliver the above units by August 27/28 1975 ...

4. We will hold the price of either the Cat D6C or the Cat D7F whichever you decide to purchase up till March, 1976 in consideration of your desire to purchase another seven or eight units by then.

5. As agreed, the option to purchase for the machines will be exercised by [the first appellants] or its assignees.

We trust that the arrangements confirm our discussion and we wish to assure you of our best services and attention at all times."

The Senior Assistant Registrar gave leave to defend but on appeal the Judge allowed the application for summary judgment. On appeal to the Federal Court the Federal Court held that it was at least arguable that the letter should be admitted on the view that the entire agreement between the parties consisted of the agreements as varied by the letter and that the two documents should in each case be read together. They considered however that the letter could only relate to the first three agreements and they therefore gave leave to defend only in respect of those agreements. – See [1980] 2 M.L.J. 127. The appellants appealed and at the appeal counsel conceded that for the purpose of considering whether there was an arguable defence the Board could look at the letter.

Held: (1) the letter is capable of being read not only as referring to an option to purchase the machines referred to in the first three agreements but is capable of referring also to the other six agreements. The letter might be regarded not as a contractual document in the sense of containing the actual terms of the contract between the parties but as part of the background against which all nine agreements fall to be construed;

(2) it is arguable that the letter contained a reference to the six machines which were eventually the subjects of the later agreements. Indeed having regard to the fact that in the appendix to each of the nine agreements the residual value is stated at the same figure of $1/– it was arguable that all nine agreements were of the same character, whatever it may have been

(3) leave should therefore be given to the appellants to defend in respect of all nine agreements.

PRIVY COUNCIL APPEAL FROM MALAYSIA.

Nicholas Lyell Q.C. (Christopher Clarke with him) for the appellant.

D.K. Rattee Q.C. (R.W. Ham and *Wong Chong Wah* with him) for the respondents.

Cur. Adv. Vult.

Lord Fraser of Tullybelton (delivering Judgment of the Board): This is an appeal against an order of the Federal Court of Malaysia (Raja Azlan Shah C.J. (Malaya), Chang Min Tat and Syed Othman F.JJ.), which confirmed in part a judgment of Harun J. in an Order 14 application by the respondents. The order of the Federal Court allowed the respondents to sign final judgment against the appellants for arrears of hire and other sums due under some of a number of agreements between the respondents and the first appellants.

The respondents and the first appellants entered into nine agreements in writing, by which the respondents let to the first appellants nine tractors. The agreements were called Equipment Lease Agreements. The respondents were described therein as the lessors, and the first appellants as the lessees. The agreements were all on printed

forms, in identical terms, with the names of the parties and the dates typed in. Each agreement had an appendix on a printed form in which the description of the particular machine and the rent, the dates and other details were completed in type or manuscript. The agreements were, on their face, leasing agreements with no element of sale. The question, and the only question, for decision by the Board now is whether there is a triable issue as to whether the agreements were what they appear to be, or were, in reality, hire purchase agreements. If they were hire purchase agreements, further questions will arise at a later stage of the proceedings as to whether the machines to which the agreements relate are goods of one of the classes specified in the First Schedule to the Hire Purchase Act, 1967 (Revised 1978) of Malaysia and, if so, whether the agreements are unenforceable having regard to certain sections of that Act, including section 6.

The first appellants are a wholly owned subsidiary of the second appellants, which entered into nine agreements called guarantees and indemnities with the respondents, guaranteeing due observance and performance by the first appellants of the terms and conditions of the leasing agreements. No separate question about the guarantee agreements arises at the present stage.

There were in all nine agreements between the first appellants and the respondents. The first three were dated September 2, 1975 and were to last for thirty months from August 28, 1975. During that period a monthly rental was payable by the lessees. In one case the rental was $9,902.50 per month. In the other two cases (which related to another type of machine) it was $7,480.00 per month. Three more agreements were dated May 25, 1976, and were to last for thirty months from that date, with rental payments of $7,480.00 per month in each case. The last three agreements were dated June 5, 1976 and were to last for thirty months from that date, again with rental payments of $7,480.00 per month in each case. All nine agreements were later varied each by a separate agreement dated June 23, 1977, which will be considered later. The first appellants paid the rentals under all the agreements until March 31, 1977, but from April 1, 1977 they ceased to make any payments. The respondents, in purported exercise of their powers under the agreements, re-took possession of eight of the machines between November 27, 1977 and December 6, 1977. The ninth machine was voluntarily returned to them by the first appellants on January 29, 1978.

The respondents are now suing for payment of the arrears of rental, with interest and certain other charges. They issued a specially endorsed writ on May 8, 1978, amended on June 5, 1978, and on July 29, 1978 they filed a summons for summary judgment under Order 14 of the Malaysian Rules of Court in respect of all their claims. The summons was supported by an affidavit of their credit control manager in which he stated his belief that there was no defence to the action.

The summons and supporting affidavit came before the Senior Assistant Registrar of the High Court at Kuala Lumpur. When it was before the Senior Assistant Registrar, the application was restricted to the claims for arrears of rental and interest, with costs, and the plaintiffs (now respondents) agreed that in respect of the other items claimed a full hearing was necessary. The Senior Assistant Registrar dismissed the application on the ground that it raised triable issues. On appeal, Harun Hashim J. set aside the Registrar's order and ordered that the respondents should be at liberty to sign final judgment against the appellants for the arrears of rental on all nine machines, with interest up to the date of repossession of the machines. The Federal Court on appeal came to a decision intermediate between those of the Registrar and of the learned judge. It varied the judge's order by giving leave to the appellants to defend in respect of arrears of rental and interest under the first three agreements (those dated September 2, 1975) but it confirmed the judge's decision so far as it applied to arrears of rental and interest under the other six agreements. The Federal Court also allowed the respondents to sign final judgment in respect of two other items in their claim, but it appears that the decision on those items may have been given *per incuriam*.

The application for summary judgment was resisted on the ground *inter alia* that the agreements were in reality hire purchase agreements. In support of that contention the first appellants (defendants) relied on a letter dated August 21, 1975 from the respondents to them. Koh Kim Chai, who is a director of both appellants, swore an affidavit dated September 11, 1978 in which he stated his belief that they had a good defence. In the lower courts the respondents argued that the letter of August 21, 1975 was not admissible in evidence. The Federal Court held that it was at least arguable that the letter should be admitted on the view that the entire agreement between the parties consisted of the agreements as varied by the letter, and that the two documents should in

each case be read together. They considered that the letter could only relate to the first three agreements, and it was for that reason that leave to defend was given only in respect of those agreements. Before the Board counsel for the respondents conceded that, for the purpose of considering whether there was an arguable defence, the Board could look at the letter, and no question now arises on that point.

The Equipment Leasing Agreements, as already mentioned, have all the appearance of being leases and nothing more. The only parts of them to which it is necessary to refer are clauses 19 and 20. Clause 19(i) of each agreement makes the ordinary provision that, upon the expiration or other determination of the lease, the lessee shall deliver the machine in a good state of repair to the lessor. That provision is entirely consistent with the agreement being purely a lease. Clause 20, which is deleted from each of the printed forms, provided for the lessee to have an option to renew the lease on the expiration of its original term. The fact that this clause has been deleted appears to their Lordships to be more consistent with the agreements having been intended to take effect as agreements for hire purchase than for hiring alone. But the most significant feature of the agreements is in the appendix to each of them. The appendix gives details of the "total rent" and of the monthly instalments by which it is to be paid, and it then contains the following statement, which is typed in as an addition to the printed form, "Residual Value $1.00". Counsel for the appellants founded strongly on that provision as indicating that the parties intended the lessee to have the option of purchasing the machine, at the end of the period of hire, for the nominal price of $1.00. Their Lordships consider that that is at least a possible inference, although it is not one that they would regard as justified if the provision as to residual value stood alone.

But it does not. The other main basis for the appellants' case is in the letter of August 21, 1975. With that letter the respondents enclosed the first three agreements, which were executed by the first appellants a few days later, on September 2, 1975. The relevant portions of the letter are as follows:

"Dear Sirs,

LEASE AGREEMENTS FOR CATERPILLAR EQUIPMENT

Further to your discussion with the writer and our General Manager Sales, we wish to confirm the following arrangements:–

1. We attach herewith our equipment lease agreements for two (2) units Cat D6C DD and one (1) unit Cat D7F DD all complete with Carco Winches. The details and terms of the lease are as per the agreements attached. We will deliver the above units by the August 27/28, 1975.

4. We will hold the price of either the Cat D6C or the Cat D7F whichever you decide to purchase up till March, 1976 in consideration of your desire to purchase another seven or eight units by then.

5. As agreed, the option to purchase for the machines will be exercised by [the first appellants] or its assignees.

We trust that the arrangements confirm our discussion and we wish to assure you of our best services and attention at all times."

It will be observed that the letter bears to "confirm" arrangements, which presumably had been made orally, although there is no evidence on that matter. The most important paragraphs of the letter are paragraphs 4 and 5. Paragraph 4 clearly contemplates that the first appellants desire to "purchase" machines of either of the two types mentioned. Those were the types of machines to which the first three agreements related; one of the first three machines was type D7F and the other two were type D6C. The respondents undertook to "hold the price" until March 1976, which their Lordships understand to mean that they would not increase the price until that date. That promise was stated to be in consideration of the appellants' desire to "purchase" another seven or eight units by then. The price is not stated, but it is presumably the basic price included in the total rent stated in the appendix. It must be less than the total rent, as the latter sum will include an element of interest to allow for the fact that payment in full is postponed for thirty months. Paragraph 5 refers expressly to "the option to purchase for the machines". The precise significance of these paragraphs is not altogether clear, but in the opinion of their Lordships they provide a most significant background for the provision in the appendix of each of the leasing agreements as to a residual value for the machines. These two elements, the residual value and the reference in paragraph 5 to the option to purchase, were the basis of the defence outlined by Koh Kim Chai in his affidavit of September 11, 1978, to the effect that the agreements were in fact agreements for hire purchase. The affidavit is somewhat lacking in particularity, and it unfortunately does not give a full explanation of the reasons for the various provisions in the agreements and the letter, but their

Lordships are of the opinion that it gives just enough to show that a triable issue exists.

The Federal Court considered that it was arguable that the letter formed part of the total agreement relating to such machines as were referred to in paragraphs 4 and 5. But they took the view that the option to purchase which was given could only refer to the three machines covered by the first three agreements, which were enclosed with the letter, and that it could not refer to the subsequent leasings. Their Lordships agree that the letter is capable of being read as referring to an option to purchase the machines referred to in the first three agreements but they are of opinion that it is capable of referring also to the other six agreements. They consider that it might be regarded, not as a contractual document, in the sense of containing the actual terms of the contract between the parties, but rather as part of the background against which all nine agreements fall to be construed. Paragraph 4 refers to the purchase of "another seven or eight units" and it is, in the opinion of their Lordships, arguable that that is a reference to the six machines which were eventually subjects of the later agreements. Indeed, having regard to the fact that in the appendix of each of the nine agreements the residual value is stated at the same figure of $1.00, it appears to be arguable that all nine agreements were of the same character, whatever it may have been. Accordingly their Lordships consider that the proper course is to give leave to the appellants to defend in respect of all nine agreements.

That opinion is reinforced by consideration of the variation agreements dated June 23, 1977. The schedule to each of these agreements states the total amount outstanding under the original Equipment Lease Agreement to which it relates, after certain additions and deductions it brings out a new figure of total rental and a new monthly rental. In each case the new monthly rental (payable from October 1, 1976 until September 1, 1979) is lower than the original monthly rental. In each case also the "residual value" is very much higher than the original amount of $1.00. It would appear that a probable explanation of the varied figure is that, in consideration of payment of the total rental having been deferred, and of the reduction of the monthly instalments, the residual value has been increased, but that the parties still intended that the lessees were to have an option to purchase at the new residual value.

For these reasons their Lordships will advise His Majesty the Yang di-Pertuan Agong (1) that the appeal should be allowed, the orders of the Federal Court and the High Court set aside and the order of the Senior Assistant Registrar restored; (2) that the case be remitted to the Federal Court for that Court to make any orders that may be necessary as to further procedure in the light of their Lordships' judgment and (3) that the respondents pay to the appellants the costs of these proceedings so far in the High Court and the Federal Court and of the appeal to this Board but that the costs of the proceedings before the Registrar be costs in the cause.

The proceedings will now revert to the position in which they stood immediately after the Registrar's decision on November 3, 1978. The only result of the respondents' persistence in seeking an order for summary judgment is that four years and much money have been wasted.

Appeal allowed.

Solicitors: *Kingsford Dorman; Herbert Smith.*

MERCHANT CREDIT PTE. LTD. v. INDUSTRIAL & COMMERCIAL REALTY CO. LTD.

[P.C. (Lord Fraser of Tullybelton, Lord Scarman, Lord Bridge of Harwich, Lord Brandon of Oakbrook and Lord Templeman) November 29 & 30, 1982 and January 27, 1983]

[Privy Council Appeal No. 20 of 1981]

Company Law – Shares – Purchase of – Whether shareholders have a right to refund – Illegal reduction of capital.

The appellant company in this case was incorporated pursuant to a shareholder's agreement dated March 28, 1972 and made between the Industrial and Commercial Bank Ltd., Arthur Lipper International Ltd. and a Mr. Sinclair. The initial share capital of $300,000 was issued. In late 1972 and early 1973 the directors of the appellant company decided to invest in an ice skating project in Kuala Lumpur, Malaysia. It was agreed that land and equipment for the project should be purchased in Kuala Lumpur amounting to about $970,000. Pursuant to this further shares were subscribed in the following proportions – Arthur Lipper International Ltd.– 332,500 shares, Industrial & Commercial Bank 332,500 shares and Mr. Sinclair 35,500 shares. Arthur Lipper International Limited paid for its shares and the International & Commercial Bank Ltd. caused the respondent company, its subsidiary to pay for its shares. The share application money was paid into the appellants company's bank account as agreed by the parties. The issue of the shares was deferred "until the ice skating project proved to be a going concern". Work on the Kuala Lumpur project was started in 1973 but in December 1974 the project was abandoned as planning permission could not be obtained. The respondents de-